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No. 120, Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

OBJECTIONS OF THE STATE OF NEW JERSEY
TO THE MOTIONS OF AMICI CURIAE FOR
LEAVE TO FILE BRIEFS IN SUPPORT OF THE
EXCEPTIONS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	page
Objections of the State of New Jersey	1
Conclusion	9

TABLE OF AUTHORITIES

Case:	Page
<i>United States v. Louisiana</i> , 363 U.S. 1 (1960)	4
Miscellaneous:	
R. Stern, <i>Appellate Practice in the United States</i> (2d ed. 1989)	4

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New Jersey respectfully objects to the motions of three groups of proposed *amici curiae* comprised of three individuals and seven associations for leave to file briefs in support of the exceptions of the State of New York. The proposed *amici* briefs attempt to introduce into the record new evidence in support of New York's position that was either overlooked or ignored by that State during the proceedings below. In addition, the proposed *amici* briefs address legal and factual issues that are wholly irrelevant to the questions to be decided in this appeal. The motions for leave to file *amici* briefs, therefore, should be denied.

The so called "proposed historian *amici*" consist of two historic associations, the New-York Historical Society, and the Society for New York City History, and three history professors,

Arthur M. Schlesinger, Jr., Richard C. Wade, and Kenneth T. Jackson. In their proposed brief in support of New York's exceptions these amici present "expert" opinions concerning the negotiations preceding the 1834 Compact. The proffered opinions rely almost exclusively on evidence that was not entered into the record below by either party and present "a detailed summary of relevant events in the years 1832 through 1834 and brief accounts of the most significant participants in those events." (Proposed Historian Amici Brief at 3). In fact, the proposed amici admit that their brief "cites to a number of letters and documents . . . that were not introduced into evidence at trial" (Proposed Historian Amici Brief at 7, n.5). Because an amici brief is not the proper vehicle for introducing into the record evidence that was available to a party that either overlooked that evidence or decided not to seek its introduction during the fact finding process, the motion of the proposed historian amici for leave to file a brief should be denied.

New York had an opportunity to select expert historians to present testimony and offer evidence in support of that State's position during the hearings in this matter. Indeed, New York produced three such experts, covering all or part of nine days of testimony, and introduced into the record hundreds of pages of historical documents. Having had the lion's share of its expert historians' opinions rejected by the Special Master, New York now tries to bolster its position through the submission of new opinions and new evidence in the thinly disguised veil of the

proposed historian *amici* brief. It is simply too late in the day for New York to resuscitate its historical evidence with new expert opinions and evidence.

The hypotheses of the proposed historian *amici* and the evidence upon which they purport to rely are being proffered to the Court long after the conclusion of the hearings in this matter. New Jersey would be severely prejudiced by the acceptance of the historian *amici*'s brief, as it will have no opportunity to cross-examine the proposed expert historians, to analyze thoroughly the new evidence upon which they rely, or to offer its own expert testimony concerning the new opinions of the proposed *amici*.

Moreover, an *amici* brief cannot serve to introduce scores of historic documents into the record. The proposed *amici* cite dozens of articles, letters, and other materials relating to the individuals who negotiated the 1834 Compact. According to the proposed *amici*, this evidence is available "in publicly accessible state or university collections." (Proposed Historian *Amici* Brief at 7, n.5). Thus, New York had every opportunity to locate this evidence prior to the hearings in this matter and to present testimony regarding these documents in support of its claims. New York either failed to locate this material or made the strategic decision not to seek its introduction into the record. It is entirely inappropriate for this new evidence to be introduced into the record at this late stage in the proceedings through an

amici brief.' While amici might, in limited circumstances, rely on judicially noticeable evidence not introduced by the parties, such evidence "should not relate to the facts of the particular case as between the parties" R. Stern, *Appellate Practice in the United States*, at 306 (2d ed. 1989). The historic evidence relating to the Compact contained in the proposed amici brief directly relates to the factual dispute between the parties. The proposed historian amici cannot attempt to cure New York's failure to introduce sufficient evidence to establish its claims through the introduction of such evidence in the guise of an amici brief.

Additionally, the proposed historian amici seek relief from the Court that is not requested by New York, the party that the amici claim to support. Proposed amici request that the Court "take whatever measures it deems necessary to ensure that the record is complete," suggesting that the Court might "remand the case to the Special Master with specific instructions concerning additional factfinding." (Proposed Historian Amici Brief at 29, and n.17). New York has made no such request, apparently aware

Proposed Amici's contention that the new evidence it seeks to introduce constitutes "the type of historical documents of which this Court has taken judicial notice in other original jurisdiction cases," (Proposed Historian Amici Brief at 7, n.5), is entirely unpersuasive. In *United States v. Louisiana*, 363 U.S. 1, 12-13 (1960), cited by proposed amici, the Court took judicial notice of historical documents "[b]oth sides ha[d] presented in support of their respective positions." Of course, where the parties have introduced evidence during the fact finding stage of an original action, and had a chance to analyze and respond to that evidence, its consideration by the Court is entirely appropriate. Proposed amici, on the other hand, seek to introduce an array of historical materials and expert opinions at the eleventh hour, without affording New Jersey the opportunity to subject the evidence to an appropriate level of scrutiny.

that it had already missed its opportunity to collect the evidence referred to by the proposed amici. Nor has New Jersey argued to this Court that further fact findings are necessary. After an extensive amount of discovery, the Special Master conducted exhaustive hearing in this matter over a period of six week during which both States presented numerous witnesses, scores of documents, and a complete array of historic evidence. Neither State has requested that that comprehensive process be repeated. The proposed historian amici should not be permitted to submit a request to this Court to the contrary.

The motions of the two other groups of proposed amici for leave to file briefs should also be denied. Three preservationist organizations calling themselves the "proposed New York landmarks amici," the New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council, and two other associations, the National Trust for Historic Preservation in the United States and the Municipal Art Society of New York, seek leave to file briefs in this matter. The proposed briefs would add little, if any, meaningful legal analysis to the issues to be addressed by the Court. Their motions, therefore, should be denied.

Notably, these five entities constituted a single amici group during the proceedings below, during which they participated at various stages. However, the organizations now seek to file two amici briefs before this Court, doubling the amount of pages of argument available to further their nearly identical special interests.

The brief of the National Trust for Historic Preservation and the Municipal Art Society is based entirely on the exceedingly unlikely hypothetical that the federal government might relinquish to private developers its ownership of and authority over one of the nation's most cherished landmarks. Not only do the proposed amici based their brief on this speculative scenario but they also request that New York be granted sovereignty over the entire Island on the specious argument that New Jersey cannot be trusted to preserve the historic buildings within its territory.

Additionally, proposed amici urge the Court to grant New York sovereignty over the filled portion of the Island based on a strained interpretation of Article III of the Compact. New York's exceptions make no claims based on Article III. To the contrary, New York's exceptions are limited to legal contentions concerning Article II of the Compact. The Special Master's interpretation of Article III has not, therefore, been challenged by the parties and is not before the Court. The proposed amici brief's focus on this provision of the Compact justifies its exclusion.

Proposed amici's arguments are based wholly on the premise that the federal government will transfer its title to and jurisdiction over the historic buildings on Ellis Island to a private developer and, presumably, in doing so will impose no duty on the developer to preserve those buildings. This premise is pure fantasy, as nothing in the record of this case or history of this nation suggests that the United States would abandon one of its most prominent national treasures.

As amici admit, as a matter of comity, the federal government currently consults both New Jersey and New York with respect to the preservation of buildings on Ellis Island. (Proposed Brief of National Trust amici at 11, n.6). Under this arrangement, the Main Building and some adjoining structures have been beautifully restored and opened to visitors. During the hearings in this matter nothing was introduced into the record to suggest that the federal government intends to abandon Ellis Island or refrain from its joint consultations with the States with respect to preservation should New Jersey's sovereignty be recognized by this Court. The proposed brief, therefore, adds little to the relevant legal issues to be decided by this Court.

In addition, amici take the specious position that only New York's laws are sufficient to allow entrustment with our nation's historic monuments. In so doing, proposed amici undertake a review of New Jersey's and New York's preservation laws, declaring those of New York to be superior. Based on this biased conclusion, amici assert that New York should be declared sovereign over the entire Island. Of course, amici's comparison of the preservation laws of the two States is wholly irrelevant to the issues to be decided in this case, as an interstate boundary cannot properly be determined on the basis of the historic preservation laws enacted by the States that share the boundary.

In addition, proposed amici predict that shared sovereignty on Ellis Island will result in impracticality and inconvenience. These predictions are entirely without support in

the record, a fact made apparent by amici's attempt to introduce evidence that was not offered by the parties during the hearings in this matter. (See Proposed Brief of National Trust amici at 10). As discussed above, amici briefs are not the appropriate vehicle for the introduction of evidence that a party to the underlying action failed to discover or introduce at trial.

Moreover, the so-called landmarks amici brief largely concerns legal concepts irrelevant to the issues to be decided in this matter. The proposed amici dedicate a significant portion of their brief to arguments concerning the extent of the limited jurisdiction granted to New York over certain waters and underwater land on New Jersey's side of the Hudson River boundary. Without convincing explanation, the proposed amici make a leap in logic to argue that the scope of this limited jurisdiction is relevant to historic preservation of buildings on the portion of Ellis Island created through fill after 1834. The filled portions of Ellis Island are neither water nor underwater land and whatever limited jurisdiction on New Jersey's side of the boundary may have been granted to New York in the Compact is wholly inapplicable to the historic structures on the portion of Ellis Island within New Jersey's sovereignty. As has been the case with arguments raised by other proposed amici, New York's exceptions do not address its purported authority to control historic preservation on the filled portions of the Island. The issue simply has not been raised by New York. Thus, the proposed landmarks amici brief adds nothing to

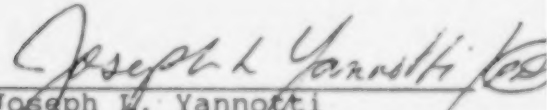
the legal issues relevant to this matter and should not be accepted by the Court.

CONCLUSION

For the reasons stated herein, New Jersey respectfully submits that the Court should deny the motions of proposed amici curiae for leave to file briefs in support of the exceptions of the State of New York.

Respectfully submitted,

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